



BEFORE THE STATE BOARD OF EQUALIZATION
OF THE STATE OF CALIFORNIA

In the Matter of the Appeal of)
FAUSTO TANZI)

For Appellant: **Fausto** Tanzi,
in pro. per.

For Respondent: Michael **R.** Kelley
Counsel

O P I N I O N

This appeal is made pursuant to section **18593** of the Revenue and **Taxation Code** from the action of the Franchise Tax Board on the protest of **Fausto** Tanzi against a proposed assessment of additional personal income tax in the amount of **\$1,099.78** for the year 1978.

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The issue presented by this appeal is whether appellant is entitled to a business loss **deduction** for expenses associated with a house he owns in Costa Rica.

Appellant is a medical doctor who apparently was originally from Costa Rica. For some time prior to the **years** at issue, he owned a lot on the ocean in Costa Rica. In 1974, appellant sold a one-half interest in that lot to a colleague, and they had a house built on the property at a cost of approximately \$166,000. Construction of the house was completed in 1977, and a swimming pool was added in June 1979. The house remained unoccupied until June 1980, when appellant retired and moved into it. Later, appellant's **colleague** also retired and moved into the house.

During the years at **issue**, appellant claimed deductions for all expenses associated with and for depreciation of the Costa Rica house. Respondent determined that appellant's ownership of the house was not an activity engaged in for the production of income and therefore concluded that appellant was entitled to deduct only the interest and property tax expenses. It issued a proposed assessment disallowing all other claimed expenses and depreciation. After considering appellant's protest, respondent affirmed the proposed assessment, and this timely appeal followed.

California personal income tax law allows as deductions all ordinary and necessary expenses paid or incurred in carrying on a trade or business and all expenses connected with property which is held **for** the production of income. (Rev. & Tax. Code, §§ 17202, 17252.) If an activity is not engaged in for profit, only limited expenses are allowed as deductions. (Rev. & Tax. Code, § 17233.) Appellant contends that his ownership and maintenance of the Costa Rican property was an activity engaged in for profit and therefore that he was entitled to deduct all the ordinary and necessary expenses connected with that activity,

In order to prevail, appellant must have acquired and held the property primarily to make a profit and not primarily for personal, nonprofit purposes. (Joseph W. Johnson, Jr., 59 T.C. 791 (1973), affd. on other grounds, 495 F.2d 1079 (6th Cir.), cert. den., 419 U.S. 1040 [42 L.Ed.2d 317] (1974); Appeal of Clifford R. and Jean G. Barbee, Cal. St. Bd. of Equal., Dec. 15, 1976.) Whether property is held primarily for profit is a question of fact, and the taxpayer bears the burden of

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proof. (Eino D. Wesa, ¶ 82,155 P-H Memo. T.C. (1982); Appeal of Ivan S. and Judith A. Fucilla, Cal. St. Bd. of Equal., March 2, 1977.) Although the taxpayer's expressions of intent are relevant, they are not controlling. Rather, the taxpayer's motives must be determined from all surrounding facts and circumstances. (Appeal of Clifford R. and Jean G. Barbee, supra.) Factors which are relevant in determining the taxpayer's motives include the amount of income earned, what steps were taken to rent the property, whether the property was available for personal use, the type of property involved, and whether the taxpayer could in good faith have expected to realize a gain from holding the property. (Richard H. Nelson, ¶ 78,287 P-H Memo. T.C. (1978); Appeal of John E. and Amet Z. Newland, Cal. St. Bd. of Equal., Sept. 17, 1975.)

Appellant never succeeded in renting his house and therefore realized no income from holding the property. Appellant explains that this failure was caused by changes in the Costa Rican economic and political situation and by the government's failure to complete a planned highway which would have run past appellant's property, linking it to a major port. While we do not doubt that these events occurred and made appellant's property less desirable, this alone does not establish that appellant acquired the property with a profit motive, rather than as a retirement home.

Appellant has failed to establish that he took any substantial steps towards renting the property. Appellant submitted letters from two prominent citizens of Costa Rica as proof that he attempted to rent the property, but these letters merely state in general terms that appellant's property was on the rental market and do not establish that appellant made any serious effort to rent the property. Although appellant contends that he contracted with a rental agent to manage the property, he has not produced copies of any such contracts despite respondent's requests that he do so.

Appellant has also failed to establish that he did not purchase the property as a retirement home. Despite the high cost of the house, appellant has produced no evidence concerning what factors convinced him that a profit could be made by renting it. Nor has he produced any evidence to show that he considered the possibility of constructing more typical types of rental property. Finally, merely one year after completion of construction of a swimming pool on the property, appellant

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chose to retire and live in the property. The record before us contains no evidence to contradict a finding that this was appellant's plan from the time he acquired the property. Although he may have attempted to minimize the cost of his eventual retirement home by renting it, this alone does not transform the property into property held primarily for the purpose of making a profit.

(Lester W. Lindow, ¶ 78,301 P-H **Memo. T.C. (1978).**) We cannot, therefore, find that the property was acquired and held primarily for the purpose of making a profit.

For the above reasons, we must sustain appellant's action.

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O R D E R

Pursuant to the views expressed in the opinion of the board on file in this proceeding, and good cause appearing therefor,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED, pursuant to section 18595 of the Revenue and Taxation Code, that the action of the Franchise Tax Board on the protest of Fausto Tanzi against a proposed assessment of additional personal income tax in the amount of \$1,099.78 for the year 1978, be and the same is hereby sustained.

Done at Sacramento, California, **this 13th** day of December , 1984, by the State Board of Equalization, with Board Members Mr. Nevins, Mr. Dronenburg, Mr. Collis, Mr. Bennett and Mr. Harvey present.

Richard Nevins, Chairman

Ernest J. Dronenburg, Jr., Member

Conway H. Collis, Member

William M. Bennett, Member

Walter Harvey*, Member

*For Kenneth Cory, per Government Code section 7.9